United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1494

To be argued by
PHILIP A. LACOVARA

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

No. 76-1494

UNITED STATES OF AMERICA,

Appellee,

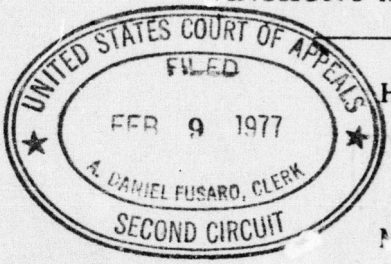
v.

ANTHONY M. NATELLI,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT, ANTHONY M. NATELLI



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PRELIMINARY STATEMENT

Appellant, Anthony M. Natelli, appeals from the order of October 20, 1976, entered by Judge Richard Owen of the United States District Court for the Southern District of New York, denying appellant's motion for a new trial pursuant to Fed. R. Crim. P. 33 and for other relief under 28 U.S.C. §2255.

Appellant was tried, together with co-defendant Scansaroli, before Judge Harold R. Tyler in the United States District Court for the Southern District of New York, on a charge of knowingly submitting to the SEC a proxy statement containing a false statement in violation of section 32(a) of the Securities Exchange

Act of 1934, 15 U.S.C. §78ff. Following a four-week jury trial, judgments of conviction against both defendants were entered on December 27, 1974. A sentence of imprisonment for one year and a fine of $10,000 was imposed upon appellant; the sentence of imprisonment was suspended except as to 60 days.

Appellant's conviction was affirmed by this Court on July 28, 1975, in an opinion reported at 527 F.2d 311.[1] The Supreme Court denied certiorari on April 19, 1976, 425 U.S. 934.

Appellant's motion for a new trial and other relief under 28 U.S.C. §2255 was filed in the district court on April 23, 1976, and denied on October 20. A timely notice of appeal was filed on October 28, 1976.

Following the district court's denial of that motion, appellant began serving his sentence and has now completed his term of imprisonment.

QUESTIONS PRESENTED

1. Whether a conviction for willful and knowing submission of a materially false financial statement to the SEC, in violation of section 32(a) of the Securities Exchange Act of 1934, may be sustained where the government failed to introduce any evidence that the financial statement was actually false in the respect alleged and, instead, relied only on the "suspicious circumstances" said to impose on defendant a duty to investigate.

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[1] The conviction of Scansaroli was first reversed by this Court, then reinstated on the government's petition for rehearing, and finally vacated again on Scansaroli's petition for rehearing. In connection with an administrative settlement between Scansaroli and the SEC, the government has determined not to re-try him.

2. Whether a conviction obtained as a result of factual assertions by the prosecutor that were subsequently established to be erroneous by the government's evidence at another trial offends the Due Process Clause of the Fifth Amendment, as well as fundamental principles of justice enforceable by the supervisory powers of the federal appellate courts.

STATUTES INVOLVED

The pertinent provisions of section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78ff, and of 28 U.S.C. §2255, are contained in Appendix A hereto.

STATEMENT

A. Introduction

This is an unusual case: Appellant, who was a partner in one of the world's largest accounting firms, stands convicted of knowingly submitting a false financial statement to the SEC even though (1) there was no proof at his trial that the statement was false as alleged, and (2) the version of the facts presented to the jury by the prosecutor at appellant's trial was false, as shown by the government's evidence in later trials, and severely prejudiced appellant.

Prior to indictment in January 1974, appellant was the partner in charge of the Washington office of Peat, Marwick Mitchell & Co. (PMM), a world-wide firm of certified public accountants. A single count in the multiple-count indictment charged that, while acting as the partner in charge of an engagement of PMM to serve as outside accountants for National Student Marketing Corporation (NSMC), appellant knowingly

caused materially false statements to be included in a proxy statement filed with the SEC by NSMC in September 1969, in violation of section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78ff. The same count charged four officers of NSMC and Joseph Scansaroli, an accountant assigned by PMM to supervise the NSMC engagement under appellant's general oversight, with the same offense. The remaining 13 counts of the indictment, which did not name appellant, charged a total of five officers of NSMC with violations of the securities and mail fraud statutes and with conspiracy.[2]

The NSMC engagement of PMM for which appellant was the partner-in-charge included accounting work incident to NSMC's filing of a proxy solicitation statement with the SEC in September 1969. The single count of the indictment naming appellant charged that the proxy statement was false in two respects, and the jury was instructed to convict if it found that the proxy statement was false in *either* respect. The first specification of falsity was directed to *audited* financial statements of NSMC for the year ended August 31, 1968, which were included in the proxy statement. The second specification, and the one upon which we concentrate in this brief, concerned financials for the nine months ended May 31, 1969, which were labelled *unaudited* in the proxy statement.[3] The focus at the

[2] Four of the five officers of NSMC entered guilty pleas prior to appellant's trial, and the fifth pleaded guilty later.

[3] As this Court already has held in reversing the conviction of co-defendant Scansaroli on the second specification, *sub nom. United States v. Natelli, supra*, 527 F.2d at 325, failure of proof on one of the two specifications submitted to the jury, which returned a general verdict, requires a new trial, even if there might have been sufficient evidence on the other specification. Natelli's counsel specifically moved to dismiss the second specification because of lack of sufficient evidence before the case was submitted to the jury. Thus, this Court is not faced with any question of waiver such as was raised by the government's petition for rehearing as to Scansaroli.

trial regarding this specification, as reflected in this Court's opinion affirming the conviction, was whether the circumstances surrounding the inclusion of revenues related to a contract with Eastern Airlines – which the prosecutor repeatedly asserted was a "phony" – were "suspicious" enough to impute to appellant the knowledge that something was amiss. The evidence at trial concerning this specification is summarized below.

B. The Evidence Adduced At Trial

NSMC was a company that offered promotional services to other companies, designing advertising and marketing programs targeted at the youth market. Each program was tailored to an individual client's needs. Under a "fixed-fee" arrangement, if a client accepted the NSMC-designed program, it agreed to pay NSMC a fixed price, and NSMC then subcontracted to third parties the essentially ministerial tasks of program implementation, such as the printing and mailing of advertising materials. The "fixed-fee" contracts constituted a substantial proportion of NSMC's business and were so labeled in order to distinguish them from contracts under which NSMC's compensation was tied to the volume of consumer response to its promotional program. (Tr. 330-331, 335-338, 1826-1831).[4] In preparing its unaudited figures for the nine-month period ended May 31, 1969, NSMC included earnings attributed by its management to "fixed-fee" contracts entered into during that period.

[4] References in the form "Tr." are to the stenographic transcript of appellant's trial which appears in Volumes II, III and IV of the Appendix, submitted in connection with Natelli's direct appeal, No. 75-1004, with the original pagination retained. References in the form "A." are to Volume I of the Appendix. References in the form "Gx." and "Nx." are to Exhibits introduced by the Government and by appellant, respectively, and are found in the separate Exhibit Appendix, referenced in the form "E." References in the form "JA" are to the Joint Appendix submitted in connection with this appeal.

NSMC was a young company that had experienced rapid growth under the boom conditions of the late 1960's. Its basic procedures and accounting methods, established before PMM was engaged, reflect the rapid growth it had experienced. Under the fixed-fee contract system NSMC completed the bulk of its creative work and expended substantial costs by the time the program design was complete. NSMC's management believed that its current financial condition would be most accurately portrayed if the company's revenue from a fixed-fee program was matched with its costs by accruing a portion of the contract fee as revenue at the time the client agreed to go forward with the program. A "cash basis" accounting treatment would not have matched the cost of such programs with the revenues produced, since costs in a particular year might seem disproportionate to the cash income. Accordingly, NSMC adopted a "percentage-of-completion" accounting method to accrue revenue and income on fixed-fee contracts. Under this method, the percentage of the fee accrued was determined by dividing the time spent by NSMC personnel in designing the program by the total estimated time required by company personnel to complete the program from design through implementation. NSMC had accrued income on fixed-fee proposals in the preparation of financial statements since mid-1968, including the period when Arthur Andersen & Co. served as its outside accountants. The unaudited nine-month figures appearing in NSMC's proxy statement included accrual on fixed-fee contracts. A narrative note to the financials, appearing in the proxy statement under the heading "Contracts in Progress," explained the percentage-of-completion method of accrual and indicated that NSMC's performance on

these contracts was not complete. (Tr. 1494-1498, 1505-1508, 1838-1843; Gx. 25, E. 217).[5]

In the course of accounting work in connection with the proxy statement, NSMC's nine-month earnings statement was reviewed by appellant for any departures from generally accepted accounting principles apparent from the face of the statement itself. Since the statement was to appear clearly labelled as unaudited, however, appellant did not follow the auditing procedures, such as obtaining client confirmation, which would have been applicable if PMM had been asked to give an auditor's certificate for the nine-month statement.[6]

As originally drafted, the figures in the unaudited nine-month statement included $1.2 million of revenue attributable to a fixed-fee program NSMC had prepared for Pontiac Division of General Motors. Appellant first learned about this program from NSMC's management in the spring of 1969. At that time, appellant informed NSMC that he would object to the inclusion of revenue from this program in year-end audited financials because, while NMSC had in hand a letter from Pontiac stating that it was "planning to implement" certain proposals by NSMC, the letter was not in accord with

[5] The use of percentage-of-completion accounting had been accepted by the auditors engaged by NSMC prior to PMM's engagement. Its continued use was discussed by appellant with one of his partners, Leon Orkiss, who testified at trial that he considered it an appropriate method of accounting in light of the nature of NSMC's service-oriented business. (Tr. 1747). There was no expert testimony at the trial that this method of accounting was improper.

[6] AICPA Statement on Auditing Standards No. 1 provides that:

> The certified public accountant has no responsibility to apply any auditing procedures to unaudited financial statements. 1 CCH AICPA Professional Standards §516.02.

An accountant associated with unaudited financials does, however, have responsibility to object to *known* departures from generally accepted accounting principles. 1 CCH AICPA Professional Standards §516.06.

the form commitment letter which NSMC's general counsel had drafted in December 1968 as legally sufficient to embody a binding contract. (Tr. 518-520; 1869-1872; 1877; JA 178, 183) (reproduced in Appendix B, *infra*, p. App. 4). Appellant previously had informed the company that PMM would accept the accrual of revenue from fixed-fee contracts in audited financials only if NSMC obtained such written commitment letters from the clients involved. (Tr. 1849). When work later began on the September proxy statement, appellant again stated to NSMC management that, absent a commitment letter in the form prescribed by the company's counsel, the Pontiac program should not be included in unaudited figures. (Tr. 1914-1915).

Appellant adhered to this position when he read the proxy statement, which had been set in type, during what was intended by NSMC's management to have been the final review of the statement before final printing. This review was scheduled for August 14, 1969. That evening, appellant and the PMM engagement supervisor went to the offices of NSMC's printer in New York City to make the review, having arranged for other accountants assigned to the engagement to remain available at PMM's offices in Washington in case comparisons of the proxy statement with the work papers were necessary. (Tr. 1916-1917, 1558-1560, 746-747, 902-903). Also in attendance were officers of NSMC and attorneys from White & Case, the company's outside counsel. (Tr. 252-253).[7]

The figures set in type included revenues from the Pontiac proposal. Appellant reiterated his insistence that the Pontiac figures not be included in the unaudited statement since a binding commitment letter had not been obtained. NSMC's president, Cortes Randell,

[7] NSMC was in the process of moving its headquarters, originally in Washington, to New York. By August 1969, all account executives were located in New York, while top management remained in Washington.

insisted that NSMC had obtained a firm oral commitment from the Pontiac official involved and offered to fly appellant to Michigan so that he could meet with the Pontiac official. Appellant refused to permit inclusion of the Pontiac figures, indicating that while he had no reason to question the genuineness of the commitment Pontiac had made, the management control procedures adopted by the company at his earlier suggestion required a commitment letter in the form prescribed by the company's counsel. (Tr. 672-673, 1917-1919).

At some point during this session, which continued into the early morning hours of the following day, Randell reminded appellant of an oral commitment to a fixed-fee proposal given by Eastern Airlines during the nine-month period ended May 1969. According to appellant's testimony, Randell had first mentioned the commitment from Eastern (which had been a substantial customer the previous year) prior to the August session at the printer, and had indicated that a commitment letter was expected soon. (Tr. 1914). When Randell brought up the Eastern contract at the printer's office, however, he indicated that written confirmation in the proper form recently had been received by NSMC. Randell suggested that since the Pontiac and Eastern programs involved approximately equal billings to the clients, the Eastern contract, for which written confirmation in the proper form had been received, could be "substituted" for the Pontiac contract which lacked the proper commitment letter. This substitution, suggested Randell, would avert the need to revise the figures in the nine-month unaudited statement already set in type. (Tr. 540, 678, 1920-1924).

Appellant did not agree, even tentatively, with this suggestion. Randell, however, presented further details. Despite the lateness of the hour, Randell arranged for an NSMC account executive to telephone the printer's

office with the gross billing and costs anticipated on the Eastern contract. (Tr. 259, 541, 679). Those figures showed, however, that NSMC's expected earnings on the Eastern contract were about $200,000 less than those anticipated on the Pontiac commitment. According to all the witnesses, appellant insisted that in any event the figures then appearing in the draft nine-month unaudited financials would have to be changed, and the proxy statement therefore had to be reprinted, and stated he would consider whether revenues from the Eastern commitment could be included. (Tr. 258, 653, 1924).

During the day of August 15, Dennis Kelly, an NSMC vice-president, brought appellant a letter on Eastern Airlines stationery signed by Thomas Mullen, the Eastern Airlines Manager of Special Markets, which was in the form approved by NSMC's counsel. The letter read in pertinent part:

> This is to confirm our verbal commitment given to you on May 14, 1969.
>
> We will accept and utilize during the fiscal year, 1970, an amount of not less than $820,000 for National Student Marketing Corporation's services as offered to us in your proposal originally submitted on May 7, 1969. (JA 179) (reproduced in Appendix B, *infra*, p. App. 5).

Kelly also brought to appellant a copy of the proposal referred to in the commitment letter and reviewed with appellant the costs NSMC expected to incur on the Eastern contract. (Tr. 259-263, 1927). Appellant left New York that day, reserving decision on the question of including the Eastern contract in the nine-month financials until he could review additional company records. (Tr. 541, 682, 1928).

During the following week, the time sheets of Robert Bushnell, the NSMC account executive responsible for the Eastern account and the addressee of the commitment letter, were forwarded to appellant's office

for his review. These records showed that Bushnell had spent more than 110 hours on the Eastern program prior to the end of May. After reviewing these records and the lengthy proposal to Eastern, appellant concluded that, under precentage-of-completion accounting treatment, it would be proper for the company to accrue a portion of the revenue allocable to this Eastern commitment for the period covered by the unaudited nine-month financials. (Tr. 1928-1930; Nx. J, E. 428 *et seq.*). When the nine-month statement was revised to delete revenue and earnings attributable to the Pontiac commitment, accrued revenue and earnings from the Eastern contract were included. The final sales and earnings figures, however, were $400,000 and $200,000 lower, respectively than the figures that had appeared in the printed draft to which appellant had objected.

C. The Government's Failure Of Proof At Trial

The count of the indictment which named appellant charged that the final nine-month financials overstated sales by at least $813,569; the bulk of this figure was represented by the Eastern commitment. (A. 25). The government's bill of particulars alleged that the Eastern commitment letter was "fraudulent." (A. 81-82). At trial, the government relied principally upon the alleged falsity of the Eastern commitment to support the second specification in the indictment, which alleged that the nine-month financials overstated sales and earnings.[8]

[8] The indictment charged in the second specification that the nine-month financial statement listing "net sales" as $11,313,569 and "net earnings" as $702,270 were materially false and misleading because, "as the defendants well knew at the time the proxy statement was filed, net sales for that period were less than $10,500,000 and NSMC had no earnings at all." Indictment, Count 2, ¶4, A. 25. The government's bill of particulars contended that the Eastern contract accounted for $519,000 of

(continued)

The government, however, never proved that the Eastern contract was anything other than what it purported to be: a binding commitment by Eastern to purchase at least $820,000 of NSMC's services. Instead, the government offered to prove through two witnesses that NSMC had *written off* the Eastern contract several months after the filing of the proxy statement, but the trial judge properly rejected the proffered testimony because the reason for the subsequent write-off did not in any way reflect upon the genuineness of the Eastern commitment when booked. The government first called Robert J. O'Connor, the PMM accountant who made the actual accounting entry writing off the contract in February 1970. On *voir dire*, O'Connor testified that he did not perform an analysis of the Eastern contract, had no personal knowledge of the reason why it was written off, and was simply following his supervisor's instructions. Judge Tyler sustained the objection that O'Connor's testimony on *voir dire* did not establish any connection between the write off and "what happened in August of 1969" when the Eastern contract figures were included as part of the unaudited nine-month earnings statement. (JA 63-64).

Later in the trial, O'Connor's supervisor, John Wharton, was called by the government. The *voir dire* examination of Wharton revealed that portions of the Eastern contract were written off in 1970, not because it was "phony", but because the problems that developed in NSMC's campus representative organization led to the disbanding of the organization in early

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(footnote continued from preceding page)

the alleged $837,000 misstatement of net sales. Government's Bill of Particulars with Letter Amendment, ¶14, A. 87.

As this Court has previously noted, the Eastern contract constituted "an essential part of the 'nine-months earnings statement' specification." *United States v. Natelli*, 527 F.2d 311, 329 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) (opinion on Scansaroli's petition for rehearing).

1970 and this made it impossible for the company to perform the work called for under the contract. See p. 22, n.14, *infra.* The trial judge excluded Wharton's testimony as irrelevant to the government's obligation to prove that the Eastern contract was invalid when included in the nine-month sales and earnings statement, since there was no evidence indicating that the reasons for the 1970 write off – the breakdown of NSMC's campus division in early 1970 – "were apparent in . . . August of 1969." (JA 80-81). The government made no further effort to prove the falsity of the Eastern contract, and thus the case as submitted to the jury contained no evidence whatever on this critical point.

D. The Disputed Versions Of The Truth About Eastern

Appellant testified in his own defense that he had no reason to question the Eastern contract, since (1) NSMC's president had mentioned prior to the August review session at the printer's office that an Eastern commitment letter was expected; (2) a commitment letter in the proper form was actually given;[9] (3) the commitment letter expressly confirmed an oral commitment given by Eastern in May to an NSMC program submitted the same month; (4) NSMC's written proposal was produced for his examination and showed on its face that it had been submitted in May; and (5) time records of the NSMC account executive to whom the commitment letter was addressed confirmed the expenditure of substantial time on the proposal prior to the end of May. (Tr. 1914, 1924-1931). Thus, defense counsel urged, whether or not the Eastern contract actually turned out to be invalid, the commitment

[9] *Compare* the Eastern letter, (JA 179), with the form commitment letter drafted by NSMC's counsel, (JA 183). These letters are reproduced in Appendix B, *infra*, pp. App. 4-App. 5.

letter and the supporting documents were regular on their face, and appellant's decision not to object to inclusion of the Eastern figures could not be deemed a violation of a statute punishing *knowing* and *willful* falsehood.

The government disputed not only this conclusion but also appellant's recollection of the events. In particular, the prosecutor argued to the jury that the Eastern contract had been "hatched at three o'clock in the morning at the printers" (JA 35), that "nobody but nobody, had mentioned this enormous sale" prior to that occasion (JA 25), that it had appeared "magically" at the printer's (JA 99), and that previously no one at NSMC had "peeped a word about it." (JA 126). Six times in his opening statement (JA 24, 25, 28, 32, 35, 37), five times during his summation (JA 98, 116, 125, 126, 134), and on numerous occasions during his examination of witnesses (Tr. 257, 258, 655, 1076, 1077, 1767, 1768, 2047, 2048) the prosecutor emphasized that inclusion of the Eastern commitment was first being discussed at three o'clock in the morning. All this was in support of the government's argument that the Eastern contract was "*known* to be a complete phony when it came up." (JA 125) (emphasis added). Yet the government never proved what it asserted to the jury was the basis for conviction — that the Eastern contract was in fact a "complete phony."[10]

[10]The repeated refrain about the alleged "suspiciousness" of those discussions at 3:00 a.m. was obviously critical to the government's case on the element of culpable knowledge. Twice the jury asked for supplemental instructions on that element (convicting only after being told that "reckless disregard" was sufficient) (Tr. 2400, 2426). Once it announced itself deadlocked (Tr. 2420), and at another point the jury sent out a note asking to hear again the testimony about what was discussed and decided about Eastern at the printer's "on the morning of the 15th" (Court's Ex. 6, E. 535).

E. The Actual Facts About The Eastern Commitment Letter As Revealed In Other Proceedings

The full account of facts about Eastern, largely established by the government itself in a later prosecution, reveals that appellant was the victim of a fraudulent effort to conceal whatever infirmity there might have been in the Eastern commitment. At appellant's trial the government argued that the Eastern letter was a "phony," thereby urging the jury to believe it was a forgery and that appellant must have known it to be such.[11] The facts are, however, that the letter *was* signed by the Eastern executive whose name appeared thereon and standing by itself the letter was a fully enforceable contractual commitment. The letter was qualified, however, as a result of a collateral transaction between Mullen, the Eastern executive, and Randell. Whether this rendered the commitment unenforceable is problematical, but what is important is that there was not one word concerning the collateral transaction in the record before the jury that convicted appellant, and in fact, that collateral flaw was, as the government subsequently proved in a later trial, concealed from appellant as part of a conspiracy to deceive him.

After appellant was found guilty by the jury, the government indicted Thomas Mullen, the Eastern executive who had signed the commitment letter shown appellant in August 1969. Mullen was charged with having conspired with NSMC's president, Randell, and vice-president, Dennis Kelly, in a scheme involving commercial bribery in violation of 18 U.S.C. §1952. Specifically, the indictment alleged that whereas Mullen had provided NSMC with a document "purporting to

[11] For example, the prosecutor stated in his closing argument that "[t]hese defendants either had to think that National Student Marketing had gremlins and magic or they were making these things up." (JA 126).

confirm" a commitment to purchase NSMC's services (i.e. the commitment letter shown appellant), Mullen had assisted Randell and Kelly in concealing the fact that Eastern had in fact made no commitment. Indictment, ¶8, *United States v. Mullen*, 75 Cr. 335 (S.D.N.Y., April 1, 1975). At Mullen's trial the government proved that Mullen in fact signed the commitment letter shown to appellant, but received back from Randell a separate side letter making the commitment "cancellable upon delivery of thirty (30) days notice in writing not later than December 31, 1969." (Mullen Tr. 50-54,[12] JA 264-268) The *second* letter (which was never shown to appellant or to the jury that convicted him) might have qualified the *first* letter (the only document appellant and his jury saw). Whether the second letter rendered the Eastern commitment false or unenforceable in any sense is an open question.[13] What

[12] References in the form "Mullen Tr." are to the transcript of the trial of Thomas Mullen for commercial bribery, which began before Judge Charles Brieant, Jr. on October 14, 1975. Similar testimony was adduced at a second Mullen trial involving a perjury charge. Pertinent portions of both Mullen trial transcripts were made part of the record below.

[13] As shown below (*infra*, p. 29, n.16) the legal effect of the second letter is problematical. Although the second letter qualifies the first, it is a debatable issue of contract law whether it rendered the commitment unenforceable, in view of the fact that the commitment letter confirmed an oral commitment upon which NSMC thereafter expended resources. Moreover, Eastern never exercised its option to cancel the contract prior to the expiration of that option on December 31, 1969. The government argued below that Mullen was a "very junior-level executive who had no authority to give any commitment of any kind (a fact that Natelli doubtless would have discovered if he had ever bothered to try to make any serious check on the Eastern commitment)." Government's Memorandum in Opposition, p. 31. This statement is not supported by the record in the Mullen trial and certainly not by anything in the record at appellant's trial. A former Eastern airlines executive called as a government witness at Mullen's trial testified that Mullen had in fact earlier committed Eastern to other substantial programs

(continued)

is not debatable is that appellant had no knowledge of the possible flaw (and neither did his jury). Indeed, while opposing our application for collateral relief, the government expressly acknowledged below: "Natelli was doubtless unaware at the time of the sordid particulars

(footnote continued from preceding page)
proposed by NSMC and that oral commitments could bind the company, depending upon the "magnitude and the timing." (JA 277-280). It appeared, however, that the actual authority of certain Eastern executives, including Mullen, was limited to making contracts only for years for which the Eastern budget had been established by higher authority (JA 273-274), and the Eastern commitment was made under circumstances that would have required Mullen to seek approval from a more senior official under company policy.

Judge Brieant at the Mullen trial, however, expressly distinguished between Mullen's "actual authority" and his "apparent authority" to bind Eastern in its relations with third parties. (JA 275).

None of the foregoing material was in the record at appellant's trial. Nothing there showed any defect in Mullen's actual authority, nor established that an *ultra vires* commitment by an executive with apparent authority would not be legally enforceable by a third party.

The government's mischaracterization of the testimony at the Mullen trial simply illustrates the government's effort to avoid, for tactical reasons, disclosing to appellant's jury the degree to which appellant and the other PMM accountants were the targets of a conspiracy by others. Mullen was the principal Eastern executive who dealt with NSMC and had arranged for other commitments on which Eastern actually paid. (Mullen Tr. 203). When a PMM staff accountant, characterized by the prosecutor at appellant's trial as an "honest" man (JA 30), later attempted to "confirm" the Eastern contract during the preparation of the 1969 fiscal year-end *audit* and thus did what appellant has been found criminally reckless for not doing before allowing inclusion of the Eastern revenues in the nine-month *unaudited* statement—the staff accountant contacted Mullen and received (and accepted) a written confirmation of the Eastern commitment from him. (JA 245-246; Mullen Tr. 213-14). For the reasons given at the subsequent prosecutions of Mullen, Mullen did not mention the existence of a side letter that made the facially valid commitment concellable, and the concededly "honest" staff accountant did not discover any lack of corporate authority.

by which the Eastern letter was obtained. . . ." Government's Memorandum in Opposition, filed June 15, 1976, p. 13.

The existence of the second letter was disclosed by Randell and Kelly in statements before Judge Tyler when they entered guilty pleas, prior to appellant's trial, acknowledging that their plan was to conceal from the auditors "complete information [about Eastern] with the result that certain earnings were recorded in the proxy which may not have been reported had the auditors [including appellant] been given the full information" (A. 112-13, 125). In addition to confirming these statements, the sworn testimony given in the subsequent Mullen prosecutions revealed the complete story concerning Eastern.

At Mullen's trial for violation of commercial bribery laws, which began after this Court had issued its July 1975 opinion affirming appellant's conviction, the principal government witness was NSMC's president Randell, who was named in the Mullen indictment as an unindicted co-conspirator. Randell testified as follows concerning the history of the Eastern commitment:

> "Q. Prior to the time that National Student Marketing gave this Eastern Airlines commitment letter, had National Student Marketing given another contract to its accountants for them to book?
>
> A. Yes, we did.
>
> Q. What was that contract?
>
> A. It was with Pontiac Motor Car Company, a Division of Pontiac and General Motors.
>
> Q. When had you submitted this contract to your accountants?
>
> A. That contract was submitted in later April of 1969.
>
> * * *
>
> Q. Mr. Randell, what happened to the Pontiac matter?

A. The accountants said that unless activity had occurred, we were going to have to write that contract off and so we were aware that as of the May 31st figures, we were going to have to write that off.

Q. Did your accountants tell you they were going to disallow this Pontiac contract?

THE COURT: Who told him, not his accountants?

A. Tony Natelli. He was the partner in charge.

* * *

A. I then asked the account executives if any of them knew of other contracts which were pending which we could put on our books and Dennis Kelly said that

* * *

Q. What did Dennis Kelly say to you?

A. He said he had been working on a contract with Eastern for a number of months and he felt as though it was at the point that he could get a commitment letter on that. He didn't know, but he would see if he could.

* * *

Q. Did Kelly say anything else to you?

A. Yes, he said that Bob had been working with Tom for a number of months.

Q. Bob who?

A. Bob Bushnell.

* * *

Q. And Tom who?

A. Tom Mullen and at that time, as I recollect, Eastern was our biggest client the previous year and for the coming year they had been working two or three months on a large program.

* * *

Q. Mr. Randell, at the time you had this conversation with Dennis Kelly or prior to that,

did you know of any commitment from Eastern Airlines to spend $800,000 with National Student Marketing in 1970?

* * *

A. No, other than, as I know other than the fact that Mr. Mullen had agreed to the program, but that is all. That is all that I knew. That Mr. Mullen had agreed to go ahead with the program back in May.

Q. Who told you this?

A. Kelly had told me this a couple of months previously or Bob, one or the other, Bob Bushnell or Dennis Kelly."

(JA 256-263).

Randell testified further that on the following day Kelly had brought to his office the letter signed by Mullen indicating that Eastern was commiting itself to the purchase of at least $820,000 of NSMC's services. Kelly also brought along another letter for Randell's signature, however. This letter, addressed to Mullen, made the "commitment" cancellable upon thirty days notice given prior to December 31, 1969. Randell signed the letter since he "had to sign this one in order . . . to get the other commitment letter." (JA 265-268). Both the commitment letter and the secret side letter were admitted into evidence at the Mullen trial (JA 266,268). Randell confirmed that only the commitment letter had been given to the accountants. (JA 268). Although there was apparently "no commitment from anybody else" at Eastern (JA 267), this fact was not revealed to appellant, and the commitment letter was presented to him as a document which Mullen had authority to sign, thereby binding Eastern.

Although at appellant's trial the prosecutor had urged the jury that the Eastern matter was "hatched" at three o'clock in the morning and that no one had mentioned it previously—disputing appellant's testimony that

Randell had raised it on a previous occasion—the testimony introduced by the government at the Mullen trial showed that NSMC had in fact developed an Eastern program months before the August session at the printer's and that Bushnell and Kelly had worked on the matter, precisely as appellant testified he had been told in August. The Eastern contract was thus not a fabrication or forgery that was first "concocted" at the printer's, as argued by the government at appellant's trial. If legally unenforceable, that was the result of bizarre extrinsic facts that were concealed from appellant as part of the fraud and were similarly kept from the jury at his trial.[14]

[14]The true [illegible]n of the Eastern contract was again confirmed in deposition [illegible]stimony of Randell taken in April, 1976, in *In re National Student Marketing Litigation*, (D.D.C. Misc. 134-72) (M.D.L. Docket No. 105), and filed with the Clerk of the United States District Court for the District of Columbia. The relevant excerpts from that deposition are reproduced in Appendix C, *infra*, pp. App. 7-App. 14, and this Court may take judicial notice of this testimony pursuant to Rule 201(f), Fed. R. Ev. There Randell was questioned about the Eastern commitment and about how it was presented to appellant. His testimony explains that Eastern had been a major client of NSMC and that the "Eastern commitment" for further service was no 3 a.m. fabrication.

Instead, the testimony shows that (1) both Bushnell and Kelly developed the proposal NSMC submitted to Eastern; (2) NSMC received an oral commitment in May 1969 that was known to marketing executives in NSMC; (3) written confirmation later arrived; and (4) NSMC rendered part performance before its campus representatives system was dismantled in 1970 (an event not forseeable in 1969).

Moreover, Randell also testified that, prior to appellant's trial, he related all of these facts to the Assistant United States Attorney (Franklin Velie) who prosecuted appellant.

ARGUMENT

I.

THE GOVERNMENT'S FAILURE TO PRESENT ANY EVIDENCE ON A CRITICAL ELEMENT OF THE OFFENSE RENDERS APPELLANT'S CONVICTION INVALID.

A. The Government Failed To Prove The Element Of Falsity.

Appellant's conviction must be set aside because the government failed to introduce any evidence of the falsity of the Eastern Airlines contract, an essential part of the offense charged under the specification involving the unaudited nine-month earnings statement. Although the government repeatedly argued at trial that the Eastern contract was a "complete phony," it never provided the jury with any evidence that the Eastern commitment, as reflected in Mullen's letter, was anything other than the binding contract it appeared to be.

The government understood that actual falsity was a distinct and indispensable element of the offense charged. Twice during appellant's trial the government attempted to show, circumstantially, that the Eastern contract was invalid by offering testimony that it was subsequently written off NSMC's books. On both occasions the trial judge excluded the testimony as not tending to show that the Eastern contract was "phony"—or invalid for any reason—at the time the proxy statement was prepared. Apparently recognizing that direct proof why the Eastern commitment may have been unreliable would undermine its assertion that appellant knowingly shared complicity in the fraud, by necessarily revealing him to be a victim of the fraud,

the government made no further effort to prove this critical element of one of the two specifications charged in the indictment, even though it had such evidence in its possession.

Responding to appellant's §2255 motion below, the government was unable to point to *any* specific evidence in the record of appellant's trial demonstrating the falsity of the Eastern contract. Instead the government simply asserted that the contract was a "fabrication" and then in a footnote argued that falsity had been established by "the same proof that showed that Natelli knew it was a fabrication." *See* Government's Memorandum in Opposition, pp. 50-51 & n.*. This "proof" consisted solely of circumstances suggesting that, as this Court noted in its opinion affirming appellant's conviction, the "Eastern contract was a matter for deep suspicion" which placed appellant under "a duty . . . to pursue the matter further". *United States v. Natelli, supra,* 527 F.2d at 320, 322. But, in making the argument that a demonstration of suspicious circumstances also sufficed to prove the actual falsity of the Eastern contract, the government confuses two distinct elements of the offense, each of which must be proven to sustain a conviction.

The essential elements of the charge against appellant required proof that (1) "the financial statement was false or misleading in a material respect" and (2) that the defendant "knew it to be" false. *United States v. Simon*, 425 F.2d 796, 798 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970). In this case the government devoted its efforts to showing that appellant had acted "knowingly" within the meaning of the statute in that he failed to investigate the suspicious circumstances and thus acted in "reckless disregard" of the truth or falsity of the Eastern commitment. We do not now challenge this Court's holding on the direct appeal that the failure

to investigate made appellant accountable for any *actual falsity* of the nine-month earnings statement attributable to the invalidity of the Eastern contract. But the government was surely required to prove the underlying predicate—the allegation that the Eastern contract was *in fact* invalid (thereby rendering the accrued revenues in the unaudited statement "false")—in order to establish that appellant committed the offense charged. Failure to investigate is no crime if the financial statement is in fact true. And that critical element must be the subject of proof, not surmise. As the Eighth Circuit recently held in reversing a conviction for failure to prove that the firearms business the appellant aided was unlicensed, facts raising "some suspicion" that the business was unlicensed were inadequate to sustain a conviction because "it is well settled that a jury is not justified in convicting a defendant on the basis of mere suspicion, speculation or conjecture." *United States v. Barker*, 542 F.2d 479, 485 (8th Cir. 1976).

Evidence of suspicious circumstances suggesting knowledge of *possible* illegality cannot ordinarily do double-duty and also show the illegality itself. That is a separate question, susceptible of independent proof. The government in appellant's case was required to prove actual falsity of the financial statement as well as the defendant's knowledge of falsity, just as in a prosecution for receiving stolen goods the government must prove both that the goods were stolen *and* that the defendant knew of their stolen character. In the analogous receiving-stolen-goods case, it is not enough simply to prove that the accused received goods under "suspicious circumstances" and assumed the risk that they were stolen. As Judge Aldrich has stated, the government could not succeed if it "were unable to prove that the goods had been stolen and merely

established that the defendant had reasonable grounds to believe they were." *United States v. Numrich*, 144 F.Supp. 812, 813 (D. Mass. 1956).

In passing upon sufficiency-of-the-evidence questions in such cases, this Court has consistently treated the two elements as distinct and has separately analyzed the evidence supporting each element. In *United States v. Clark*, 525 F.2d 314 (2d Cir. 1975), for example, the defendant was convicted of receiving a stolen diamond. In holding that the element of knowledge was sufficiently proven, the court relied upon evidence showing that, according to his own testimony, the defendant had bought the diamond at a price substantially under market value, that no documentary evidence to support the purchase had been produced, that shortly after the purchase defendant had altered the mounting of the diamond, and that he had given inconsistent accounts of the purchase to others. *Id.* at 316. When the court turned to the sufficiency of proof that the diamond was in fact stolen, however, it relied not upon the foregoing suspicious circumstances but on evidence of theft showing that the gem had mysteriously disappeared while kept in closely-guarded possession of the original owner. *Id.* at 315.

Similarly, in affirming the conviction of Senator Thaler and others for knowingly dealing in stolen securities, Judge Friendly pointed to the highly suspicious circumstance that matured treasury bills were being offered at a 65% discount as evidence of guilty knowledge and found that Thaler "closed his eyes to all the storm signals so apparent to [others]." *United States v. Jacobs*, 475 F.2d 270, 280 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973). The Court, however, did not rely on this circumstance to prove all of the essential elements of the crime but rather dealt separately with the question of whether the government had established that the securities were in fact stolen. In a separate

discussion of the sufficiency of the evidence of theft, the Court concluded that evidence that the treasury bills were carefully-handled documents that had disappeared from the vaults of Brown Brothers Harriman & Co. sufficed to prove that the securities were stolen. *Id.* at 279.

These cases reflect a basic proposition: notice to defendant that something is amiss may be a basis for inferring culpable knowledge, but *only* if the government separately proves the underlying illegality which the defendant is alleged to have known. The jury cannot be left to speculate whether there was underlying illegality, or what it was. For example, the proof of suspicious circumstances in the *Jacobs* case, standing alone, could just as easily have suggested that the treasury bills were counterfeit as that they were stolen. (The hypothesis that they were genuine and lawfully possessed was not plausible.) Regardless of how suspicious the circumstances, the defendants would have been innocent of the crime of possessing stolen securities if in fact the securities were counterfeit rather than stolen. The government could not have secured a valid conviction in that case if it had left the jury at sea in speculating *which* crime—possession of stolen treasury bills or possession of counterfeit securities—the defendants had committed.

The present case is even clearer, for here there was at least an equally plausible hypothesis under which appellant had not committed *any* offense: the Eastern commitment was valid, as the commitment letter indicated on its face. The government repeatedly asserted it was a complete "phony", suggesting the letter was forgery dreamed up by "magic" at 3:00 a.m. and "hatched" at the printer's (JA 24-25, 35, 125-126). But appellant committed no crime if Mullen's letter was the enforceable contract it purported to be. Despite

the prosecutor's characterizations suggesting a forgery, there was not an iota of testimony before the jury showing what in fact made the Eastern contract "false"—if anything! Other written commitments in identical form (the form prescribed by NSMC's counsel) *were* in fact valid and enforceable, and thus were properly booked and their anticipated revenues properly included in the financial statements.[15]

The simple fact is that the government offered the jury no evidence to show that the commitment was invalid and, to the extent the jury was encouraged to speculate from the "suspicious" circumstances that the contract was a forgery, that inference conflicts with the true nature of the commitment as revealed at Mullen's trial.

The natural question arises: why did the government here fail to follow through on what the prosecution clearly understood was a distinct and vital element of the charge, which it first sought unsuccessfully to prove circumstantially by offering evidence that the contract was actually written off several months later. The answer undoubtedly lies in the bizarre circumstances surrounding the Eastern commitment letter—circumstances concealed from appellant.

In view of all the circumstances now known about the Eastern commitment letter, it is a matter of considerable uncertainty whether the government could have proved that the contract was not enforceable, let alone proved this in a manner that would have advanced the government's theory of the case. The government now contends that the letter from Randell

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[15]Prior to the inclusion of the Eastern figures in the proxy *none* of the contracts represented by written commitments in the form drafted by NSMC's counsel (as Eastern was) had been written off and roughly one-half of those contracts had in fact already been billed. (Tr. 1283, 1285).

to Mullen (which appellant never saw) makes illusory the commitment embodied in the letter signed by Mullen (which was shown to appellant). But the legal effect of the side letter from Randell to Mullen is quite unclear, especially in view of the fact that the limited cancellation option was never exercised by Eastern.[16]

The government also argues that Mullen lacked actual authority to bind Eastern to this particular commitment. But even if the government had proved this at appellant's trial, it would still have had to confront the question of the apparent authority of the executive who had previously represented Eastern when obtaining other promotional programs from NSMC which NSMC performed and for which Eastern paid. (Mullen Tr. 203). The government would thus have had to show that the contract was unenforceable notwithstanding Mullen's apparent authority.

In short, proof that the Eastern contract was "false" even to the extent of the sum accrued in the financials, would have presented a difficult and complex burden for the government and the outcome, if it had attempted to carry the burden, is in doubt even now.

[16]Certainly, there is ample authority in contract law for construing the "cancel-upon-thirty-days-notice" provision to mean that Eastern could terminate its obligation with respect to any performance which NSMC had not then rendered, or had not taken substantial steps to render upon receipt of the cancellation notice. Under such an interpretation, NSMC would still have been entitled to some portion of the gross amount of $820,000, representing its actual performance of preparations. Since NSMC had in fact made substantial efforts on the Eastern program after receiving the oral commitment, under the foregoing interpretation it might well have been entitled to the full amount of the $519,000 actually accrued as gross revenues in the unaudited financials, and the inclusion would not have rendered those financials false.

Even if the government had seen a way to clear all of the foregoing hurdles, however, there was yet another, more compelling reason for the government to forebear offering proof of the complete facts about Eastern: doing so would have severely undermined the government's case on the issue of appellant's culpable knowledge.

The proof that Randell hid the truth from appellant would have severely undermined the prosecution's theory that appellant was a participant with Randell in a fraud and that, upon receipt of the "phony" Eastern commitment letter, appellant was, as the government argued below, content to "wink and turn his head away from Randell's sordid swindle, perfectly happy to let it continue." Government's Memorandum in Opposition, p. 16. Any evidence showing the lengths to which the NSMC conspirators and Mullen had gone to conceal from the auditors, including appellant, the secret side letter suggesting the possible voidability of the commitment letter undoubtedly would have led the jury to repudiate the prosecution's thesis that appellant was a knowing participant in the fraud.

The government's decision not to present any evicence of Mullen's lack of contractual authority at appellant's trial, is also understandable as a tactical gamble. Later in 1969 an accountant on appellant's staff, whom the prosecutor held out as being careful and honest (JA 30, 105-106), confirmed the existence of the Eastern contract by contacting Mullen, Eastern's Manager of Special Markets, and found no reason to question his authority to make the commitment. Holding back evidence of that alleged defect in the Eastern contract thus spared the government from having to confront the flaw in its argument that in failing to confirm the Eastern commitment with Eastern itself, appellant had acted with reckless disregard for the truth.

This was the theory of culpability apparently accepted by the jury and explicitly adopted by this Court on direct review. 527 F.2d at 320. Yet the facts now make plain that if appellant had done in August 1969 what the staff accountant did later in fulfilling the audit procedures appellant himself directed, there was no reason to believe that appellant would have been more successful than his subordinate in uncovering any defect in Mullen's authority.

The decision not to offer this evidence was deliberate and tactical. By declining to raise the question of Mullen's authority and by withholding evidence of the Randell-Mullen side letter, the government avoided these problems with its case, but it necessarily ran the risk that any conviction it obtained would be reversed for failure to prove a critical element of the offense.

B. The Government's Failure To Offer Any Evidence On An Element Of The Crime Justifies Granting Collateral Relief In This Case.

The government's opposition to appellant's §2255 motion in the district court rested primarily on the claim that the issue is foreclosed through prior adjudication. *See* Government's Memorandum in Opposition, pp. 51-54. We acknowledge that the government's failure to prove the falsity of the Eastern contract was raised on direct appeal. *See* Brief of Defendant-Appellant Anthony M. Natelli, No. 75-1004, pp. 47-49. But the fact that an issue has been raised on direct appeal does not deprive this Court of the power to rectify the government's failure to prove an essential element of the offense—an error that this Court has previously termed "the worst type of fundamental unfairness." *See United States v. Liguori*, 438 F.2d 663, 669 (2d Cir. 1971).

The general rule barring litigation of issues on a §2255 motion where the defendant raised the issue unsuccessfully on direct appeal (or did not present the issue on direct appeal at all), " 'is not one defining power but one which relates to the appropriate exercise of power.' " *Sunal v. Large*, 332 U.S. 174, 180 (1947) quoting *Bowen v. Johnston*, 306 U.S. 19, 27 (1939). The rule governing the appropriate exercise of power to review questions previously presented is sufficiently flexible to permit such review in " 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' " *Id; see e.g., United States v. Loschiavo*, 531 F.2d 659, 666 (2d Cir. 1976); *Robson v. United States*, 526 F.2d 1145, 1147 (1st Cir. 1975).

Moreover, this Court's opinion affirming appellant's conviction on direct appeal did not squarely address the issue presented by appellant's §2255 motion. The section of this Court's opinion dealing with the sufficiency of the evidence as to Natelli deals exclusively with the evidence of his knowledge of suspicious circumstances and does not mention the question of the lack of proof of the *falsity* of the Eastern commitment. 527 F.2d at 318-21. The absence of any explicit analysis of this issue on direct review undercuts the force of the government's reliance on prior adjudication. In addition, despite the fact that the government argued that appellant's claim was foreclosed by prior adjudication, the district court apparently concluded that the issue remained open since it reached the merits, even though it did not attempt to articulate what evidence laid before the jury sufficed as proof of the falsity of the nine-month financial statement. *United States v. Natelli*, No. 74 Cr. 43, slip. op. at 5 (S.D.N.Y., October 20, 1976) (hereinafter "Opinion, p.") (JA 230).

The failure of the government to present any proof of the falsity of the Eastern contract justifies collateral relief in this case for, as the Supreme Court has repeatedly held, "a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . viola.te[s] due process." *Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974) (per curiam).[17] This Court too has often held that the failure to prove a critical element of the offense charged constitutes a fundamental defect justifying the granting of relief on a §2255 motion.[18] As this Court explained in *Ligouri, supra*, 438 F.2d at 669, there is a "universal rule that a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law."

It is inconceivable that this Court would insist on keeping appellant branded as a felon in spite of the total lack of evidence of a critical element of the

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[17]Quoting *Harris v. United States*, 404 U.S. 1232, 1233 (1971) (Douglas, J., in chambers). *Accord, Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam); *Garner v. Louisiana*, 368 U.S. 157, 213, 214, 219 (1961); *Thompson v. Louisville*, 362 U.S. 199, 206 (1960); *see Anderson v. United States*, 417 U.S. 211, 223 n.12 (1974); *Adderley v. Florida*, 385 U.S. 39, 44 (1966).

[18]*See, e.g., United States v. Loschiavo*, 531 F.2d 659, 666-67 (2d Cir. 1976); *United States v. Travers*, 514 F.2d 1171, 1175-77 (2d Cir. 1974); *United States v. Liguori, supra*, 438 F.2d at 669. *Accord, Robson v. United States*, 526 F.2d 1145 (1st Cir. 1975).

offense for which he was convicted.[19] *Compare United States v. Loschiavo, supra,* 531 F.2d at 666 ("To say that in such circumstances the system of justice can provide no remedy because of a court-made rule that failure to take direct appeal on the specific issue bars all later motions for collateral attack . . . indicates a lack of due process in the judicial system."); *United States v. Travers, supra,* 514 F.2d at 1178-79 (rejecting the notion that "a man as to whom, as we now know, the Government failed to establish an essential element of the crime charged and who did everything possible to use his appellate remedies must be forever branded as a criminal").

The government's failure to introduce evidence of the falsity of the Eastern contract is not excused by the fact that the Eastern commitment may actually have been cancellable (although in fact it never was cancelled). This Court previously has held that even where the evidence at trial clearly established that the defendant was guilty of *some* criminal conduct, it is

[19] At the time of sentencing, Judge Tyler commented about appellant and his co-defendant Scansaroli:

> "I think you are absolutely sincere when you say that you do not believe that you did anything wrong in this audit or audits for National Student Marketing. After thinking about the matter for a long time I think you honestly mean that. But the tragedy is that the jury found that this was an audit or audits done with reckless disregard for what was really involved. We know that because of the record showing what it did in the jury deliberation.
>
> "I am frank to say that I don't suppose in my experience as a nisi prius judge for almost 13 years that I have probably dealt with any two men who are more generally reputable, and deservedly so, than you are. I understand that. Not only that; you are both, in my opinion, extremely sympathetic figures." (JA 174).

Scansaroli's conviction was reversed on direct appeal for insufficiency of evidence on one specification and he will not be retried.

nevertheless funadmentally unfair to sustain a conviction where the government failed to prove an essential element of *the crime charged*. *See United States v. Loschiavo*, *supra*, 531 F.2d at 667; *United States v. Travers*, *supra*, 514 F.2d at 1179. In this case the evidence adduced at trial was insufficient to prove *any* criminal conduct with respect to the second specification. The fact that the government apparently had evidence in its possession that might have established the invalidity of the Eastern commitment provides no basis for upholding appellant's conviction on a fatally inadequate record, particularly where that evidence would have been of great help to appellant's case. *See, e.g., United States v. Barker*, 542 F.2d 479, 484-85 (8th Cir. 1976); *United States v. Wiley*, 492 F.2d 547, 551 (D.C. Cir. 1973).

Since at appellant's trial the jury was instructed that it only needed to find appellant guilty on one of the two specifications in order to convict, it is possible that the conviction rested solely on the Eastern specification. As this Court held in reversing the conviction of appellant's co-defendant Scausaroli, the failure of proof as to one of the specifications makes the verdict "ambiguous" and leaves "no alternative [but] to remand for a new trial" on the specification for which there may have been enough evidence to go to the jury. *United States v. Natelli*, *supra*, 527 F.2d at 325. Fundamental principles underlying the constitutional prohibition against double jeopardy preclude the government from retrying appellant on the specification involving the unaudited nine-month financial statement, since his motion for acquittal on that specification

should have been granted.[20] Appellant's conviction therefore should be vacated and the case should be remanded for a new trial on the first specification.

II.

THE PRESENTATION OF AN ERRONEOUS VERSION OF FACTS BY THE GOVERNMENT THROUGHOUT THE TRIAL REQUIRES A NEW TRIAL OR, ALTERNATIVELY, A HEARING IN THE DISTRICT COURT.

A. The Government Presented An Erroneous Version Of The Critical Facts.

Throughout appellant's trial, the government characterized the mid-August session at the printer as a sinister meeting and implied that the Eastern commitment had been fabricated on the spot by Cortes

[20] At the close of the government's case, appellant's counsel specifically moved to strike the second specification on the basis of the government's failure of proof (Tr. 1321-22) and then moved for a judgment of acquittal after the close of all the evidence (Tr. 2129). If, as we submit, the government failed to prove a critical element of the offense under the second specification, appellant's motion for acquittal should have been granted. To permit a retrial on the second specification where the government deliberately withheld evidence for tactical reasons would allow the government "to make repeated attempts to convict an individual for an alleged offense" thereby violating the "underlying idea" of the Double Jeopardy Clause. *Green v. United States*, 355 U.S. 184, 187 (1957) *See United States v. Wiley*, 517 F.2d 1212 (D.C. Cir. 1975); Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 Ind. L. Rev. 497 (1975); 2 C. Wright, *Federal Practice and Procedure* §470, at 272-73 (1969); Comment, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 367 (1964).

Randell and Dennis Kelly while appellant looked on. Thus, the prosecutor argued to the jury that the Eastern contract had been "hatched at three o'clock in the morning at the printers" JA 35), that "[n]obody but nobody, had mentioned this enormous sale" prior to that occasion (JA 25), that it was a "complete phony" which appeared "[b]y magic [at] 3 o'clock in the morning" (JA 125). Accordingly, the government contended, appellant knew that Randell and Kelly were "making these things up." (JA 126). The theme of fabrication at three o'clock in the morning was played and replayed by the government throughout the trial[21] with the objective of establishing what the government continues to claim was appellant's "willful connivance" with Randell to inflate the unaudited figures. Government's Memorandum in Opposition, pp. 5, 17.[22]

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[21] Six times in his opening statement, five times during his summation, and on numerous occasions during his examination of witnesses the prosecutor emphasized that inclusion of the Eastern commitment was being discussed at three o'clock in the morning. *See* pp. 14-15, *supra.*

[22] In summation the prosecutor appeared to argue that appellant had not objected to the form of the Pontiac commitment until three o'clock in the morning at the printer's plant:

> "The fact is this has to be one of the most cynical events that you will probably ever hear about, at 3 o'clock in the morning at the printers plant where they are printing up this very proxy statement there's going to be a big hole in the earnings because the Pontiac contract has to come out.
>
> "By magic 3 o'clock in the morning the first time *it* is mentioned the Eastern Airlines contract comes up." JA 125 (emphasis added).

The government now argues that the word "it" in the foregoing passage refers to the Eastern contract, rather than to Pontiac, and the government concedes that appellant had indicated at an earlier time that he would object to inclusion of the Pontiac figures. (Government's. Memorandum in Opposition, pp. 23-24).

The prosecutor's remarks were crucial to the government's effort to obtain a conviction. Appellant testified that rather than having Eastern sprung on him at the printer's office, he had learned of it on a previous occasion, when Randell had mentioned that Eastern had made a substantial oral commitment during the nine-month period in question and that a formal commitment letter was expected shortly. (Tr. 1913-1914). Accordingly, appellant explained that he was acting in good faith in accepting NSMC's inclusion of the Eastern figures in the unaudited financials. After he was told that the written commitment had been received, he was shown the commitment letter in the proper form established by counsel, and he reviewed the additional documentation (the written proposal to Eastern and the time sheets of account executive Bushnell) indicating that NSMC had presented the proposal and obtained an oral commitment from Eastern in May.

By reiterating its theme that the whole Eastern commitment had been a fabrication in the dark of night, the government successfully urged the jury to reject appellant's testimony and his defense. By repeatedly urging that Eastern had been "hatched" at three o'clock in the morning, the prosecutor told the jury not to believe that appellant had ever heard about it previously, as he had testified. Indeed, the prosecutor expressly invited the jury to find that appellant had commited perjury. (JA 145). And by contending that the Eastern contract was a "complete phony," known to be so when it appeared "by magic" at the printer's (JA 125), the prosecutor urged the jury to find that the commitment letter shown appellant was a forgery, that the other supporting documents were similar fakes, and that appellant knew Randell and Kelly were "making

these things up." (JA 126).[23] Indeed, the government continues to argue that the documents merely gave appellant an "alibi" so that he was free to "wink and turn his head away from Randell's sordid swindle, perfectly happy to let it continue . . . ." Government's Memorandum in Opposition, p. 16.

In contrast to the account urged by the prosecution at appellant's trial—and urged upon the district court in opposition to the §2255 motion—the true facts about Eastern, finally clear as a result of the later Mullen prosecution (and confirmed by Randell's subsequent deposition testimony), are quite different. As a result of Randell's testimony and the documentary proof introduced by the government at Mullen's trial, it is now apparent that, despite the version purveyed to the jury that convicted appellant: (1) NSMC *did* in fact submit a proposal to Eastern prior to the end of May 1969; (2) the NSMC account executive Robert Bushnell *did* in fact expend substantial time on the proposal, as the time sheets shown appellant indicated; (3) Mullen, the Manager of Special Markets for Eastern, *had* in fact signed a commitment letter in the approved, legally binding form; and (4) appellant had told Randell (and other NSMC executives) prior to the session at the printer's office that the revenue and earnings from Pontiac could not be accrued, thus sparking their efforts to formalize the oral Eastern commitment.

This was further confirmed by Randell's subsequent deposition testimony, wherein he indicated that Eastern *had* in fact given an oral commitment to Bushnell as the commitment letter indicated, and that this

[23] As summarized by Judge Tyler, the government's argument went even further: that appellant decided at the printer's to allow inclusion of the Eastern figures in the unaudited financials and that the subsequent checking of Bushnell's time sheets, about which appellant had testified, was a sham. (Tr. 2392).

commitment was known generally among NSMC's marketing executives.[24]

If the government had laid the real facts before the jury, appellant might well have been acquitted. The government's repeated contention that the "phony" Eastern contract was "hatched" at the printer's office loomed large in every summary of the evidence. This contention obviously was a critical factual issue. Judge Tyler, in reviewing the "high points" of the government's contentions, expressly singled out the arguments that "nobody, nobody, least of all Scansaroli and Natelli, had ever heard of the Eastern Airlines commitment until the wee hours of mid-August when they were here at the Pandick Press" and that this showed that appellant knew the Eastern contract to be "bogus material." (JA 162-163).

There is direct evidence, moreover, that the false scenario crafted by the government may have tipped the balance between guilt and innocence on an issue that was a close one in the jurors' minds. The jury plainly struggled with the case, requesting the re-reading

[24]The government argued below that it did not "vouch" for Randell's testimony at the Mullen trial, in which the government apparently considered him a hostile witness. Government's Memorandum in Opposition, pp. 29-30. But this observation surely misses the point. The important fact is that the government's opening statement at the Mullen trial (JA 237-249) affirmatively forecasts the version of the facts the prosecutor elicited on *direct* examination of Randell. Moreover, the government, which was represented through counsel for the SEC at Randell's deposition, did not contest his version of the circumstances surrounding the Eastern contract. Nothing in the testimony now made public supports the prosecutor's statement at appellant's trial. Instead the testimony plainly contradicts what the prosecutor said at appellant's trial and supports appellant's defense. The government cannot be heard to deny the accuracy of Randell's testimony at the Mullen trial without pointing to something of record showing a different version to be the truth.

of testimony on this subject, seeking additional instructions on the element of guilty knowledge, and once reporting itself deadlocked. (Tr. 2395, 2403, 2420, 2426). The request for the reading of testimony was directed to the issue of whether appellant had agreed "to allow Eastern on the morning of the 15th at Pan Dych [sic] press." (Tr. 2403; Court Ex. 6, E. 535). To a lay jury, of course, unfamiliar with the common lot of corporate lawyers and accountants, it probably seemed inherently sinister to be discussing complex financial matters at a printing plant at three o'clock in the morning. Under these circumstances, the government's repeated argument that the whole Eastern contract was fabricated at 3 a.m. was bound to have had a decisive impact.[25]

Opposing appellant's motion below, the government argued that the jury was not misled. The government now contends that the prosecutor's statements at trial meant only that the Eastern commitment letter, rather than the contractural commitment itself, had not been in existence before the August session at the printer's office and that, as so interpreted, the prosecutor's arguments were not inconsistent with the true facts as

[25] So successful has the government been with its argument about Eastern that this Court, in affirming appellant's conviction on direct appeal, apparently was led to assume that the Eastern commitment letter was a forgery. In holding that the government had met its burden of establishing culpable knowledge on a "reckless disregard" theory, this Court indicated that while appellant had checked the Eastern contract with company records he had failed to "take the next step of seeking verification from Eastern." 527 F.2d at 323. Obviously, verification would uncover certain infirmities, such as a forged document, but the facts here that might have made the commitment inform were not likely to have been discovered even if auditing techniques had been applied to review of these *unaudited* figures. And the infirmity was not in fact discovered when those auditing procedures were followed a few months later.

subsequently established. Government's Memorandum in Opposition, pp. 31-34. But any objective reading of the prosecutor's opening argument and closing summation belies the effort, at this stage, to place any such narrow interpretation on repeated assertions that the Eastern contract was a "complete phony" that had been "hatched" at 3:00 a.m. at the printer's office, and that appellant accordingly knew Randell and Kelly were "making these things up." (JA 35, 125-126).

The government also argued below that the true facts, as revealed in the Mullen trial, could not help appellant because there was "no suggestion anywhere in Randell's testimony that [appellant] himself had been made aware of Eastern's alleged plans." Government's Memorandum in Opposition, p. 34. But that contention misses the point. What is important is that (1) the actual facts, established by the government at the Mullen trial, contradict factual assertions made by the prosecutor at appellant's trial; and (2) the assertions thus proven erroneous are precisely the ones the prosecutor used in two ways crucial to its case. They were used (a) to discredit appellant's testimony that he had protested the form of the Pontiac contract prior to the session at the printer's and had been told of the oral Eastern commitment previously, under circumstances that did not contain the supposedly sinister "three o'clock in the morning" element and (b) to rebut appellant's defense that, in light of the prior history of the Eastern matter and the adequacy of its supporting documentation for the new commitment, it was no departure from professional standards—much less a knowing violation of a criminal statute—for him to allow inclusion of the Eastern figures without pursuing an external investigation.

B. Under Fundamental Principles Of Fairness, A Conviction Cannot Stand When It Is Based On Critical Errors Of Fact Advanced By The Prosecution.

From what has been shown above, quite apart from the question whether anyone in the government knew or had reason to know of the true facts, appellant's conviction should be set aside. A conviction obtained by factual assertions subsequently proved false offends principles of fundamental fairness inherent in the concept of due process. The jury which found appellant guilty was led by the government to discredit appellant's testimony that he had learned of an Eastern commitment prior to the August session at the printer's office, under circumstances thus providing far less cause for him to suspect that something fraudulent was afoot. The jury was similarly led to believe that the contract and supporting documents were concocted at three o'clock in the morning, without legitimate underpinning in the actual business of NSMC. Yet this assumed version of the events, so forcefully urged by the government, is now shown to have been grossly inaccurate. Given the critical role played by the erroneous version stated to the jury and to this Court, it is manifestly unfair to permit the conviction to stand.

The District Court concluded that all this was immaterial in any event because appellant had argued the true version of the events to the jury and could have called Randell as a corroborative witness. Opinion, pp. 3-4 (JA 228-229). But what is objectionable here is that appellant was *forced* to deny a version of events urged by the government, which can now be established as inaccurate. It is no answer to say that he did in fact have an opportunity to argue a truthful account. Just as a conviction based upon perjured testimony would not be sustained merely because the defendant had argued to

the jury that the perjurer was lying, *cf. Mesarosh v. United States*, 352 U.S. 1 (1956); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976), so it is improper here to deny relief because appellant made an effort to repair the damage done by the government's erroneous account. It is precisely *because* the jury, at the government's urging, rejected the exculpatory account now shown to be truthful that the conviction should not be allowed to stand.[26] If the jury's truth-finding function has in fact been perverted, it is surely intolerable for the government to argue that the jury's erroneous determination is conclusive.

The Court of Appeals for the District of Columbia Circuit has flatly held that a conviction must be reversed under circumstances such as these. In *Campbell v. United States*, 429 F.2d 209 (D.C. Cir. 1970), the court reversed a conviction when subsequent proceedings established that a factual assertion on a material point made by a witness and repeated by the prosecutor in closing argument was in fact untrue. Without suggesting any culpability on the part of the government for the mistake, the court reversed the

[26] Accepting the argument offered by the government below, Judge Owen relied heavily upon the fact that appellant could have called Randell but declined to do so because Randell's counsel refused to allow him to be interviewed by appellant's counsel (Martin affidavit; Stillman affidavit). This fact would be relevant if appellant had moved for a new trial solely to present newly discovered evidence on a debatable issue already litigated at the trial. This, of course, was not appellant's position. Appellant seeks reversal of his conviction because statements made by the prosecutor have been contradicted by statements made by another prosecutor and by government evidence in a subsequent criminal trial. The facts proving the inaccuracy of the prosecutor's statement have emerged only after appellant's trial, and the facts about which Randell has now testified are not fairly controverted by any other evidence.

conviction, holding that due process principles mandated this action. A conviction so obtained violates the standards of "fundamental fairness essential to the very concept of justic ." *Lisenba v. California*, 314 U.S. 219, 236 (1941). Like the conviction reverse[d] in *Campbell*, appellant's conviction can no longer be allowed to stand.

Wholly apart from the constitutional requirements of due process, the supervisory power of the federal appellate courts has been employed to protect defendants from prejudice, even where there has been no improper conduct on the part of the government.[27] The Supreme Court has repeatedly reminded us that a criminal trial is at root a "search for truth."[28] In this case that truth-seeking process went awry and the jury was led to believe exactly the opposite of the truth. In view of the central role of the circumstances surrounding the Eastern contract in the government's theory under the second specification, the proper administration of criminal justice requires an exercise of the Court's supervisory power. Appellant is entitled, we

[27]*See, e.g., Marshall v. United States*, 360 U.S. 310 (1959) (*per curiam*) (new trial ordered in exercise of supervisory power where jurors were exposed during trial to prejudicial publicity regarding the defendant); *Mesarosh v. United States, supra*, (new trial ordered in exercise of supervisory power where trial record was tainted by serious questions as to the truthfulness of the testimony of an important government witness); *Aldridge v. United States*, 283 U.S. 308 (1931) (reversing conviction where trial judge refused to permit defendant to question prospective jurors on the issue of racial prejudice where the refusal did not necessarily amount to a constitutional violation). *See generally* Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963).

[28]*United States v. Nobles*, 422 U.S. 225, 232 (1975); *Oregon v. Hass*, 420 U.S. 714, 722 (1975); *Williams v. Florida*, 399 U.S. 78, 82 (1970).

submit, to a new trial before a jury untainted by the presentation of a grossly inaccurate and misleading description of the origin of the Eastern commitment letter. *Cf. Mesarosh v. United States*, *supra*, 352 U.S. at 9, 14.

C. Alternatively, A Hearing Is Required To Establish The Facts Within The Government's Possession At The Time Of Appellant's Trial.

From what has been said above, it is apparent that reversal of appellant's conviction is mandated, quite apart from the question whether the prosecutor, or anyone else in the government, had reason to know the account urged upon the jury was false and misleading. But even if this Court should not agree, the district court nevertheless erred in denying relief. The court should have ordered a hearing designed to establish whether facts within the government's possession at the time of trial contradicted the false account given the jury by the prosecutor. Indeed, when appellant sought to present the issues raised by these post-affirmance developments in his petition for certiorari, the Solicitor General expressly represented to the Supreme Court:

> "Whatever the merit of petitioner's allegations of prosecutorial misconduct, they obviously are not suited for resolution by this Court in the first instance. The proper procedure is for petitioner to present his contentions to the district court in a motion for a new trial under Rule 33, Fed. R. Crim. P., or a motion to vacate his sentence under 28 U.S.C. 2255. A denial of certiorari would not preclude his following either of those paths." (Brief for the United States in Opposition, *Natelli v. United States*, Sup. Ct. No. 75-808, p. 30).

It is now beyond dispute that a conviction must be set aside if the government by design or carelessness allowed a false or misleading account to be presented to the jury and there is "*any* reasonable likelihood" that the inaccuracy "could have affected the judgment of the jury." *United States v. Agurs*, ___ U.S. ___, 44 U.S.L.W. 5013, 5015 (June 24, 1976) (emphasis added). This relief is available on collateral attack whether the government uses perjured testimony to convict, *see Mooney v. Holohan*, 294 U.S. 103 (1935), or selectively elicits testimony from a witness so as to give the jury a "false impression," *Alcorta v. Texas*, 355 U.S. 28, 31 (1957), or misstates the truth in argument to the jury, *Miller v. Pate*, 386 U.S. 1 (1967). These salutary principles have been applied routinely in the federal appellate courts, including this Court, in cases involving prosecutorial misstatements or "insinuating" remarks, *United States v. Burse*, 531 F.2d 1151, 1154 (2d Cir. 1976) (conviction reversed for, *inter alia*, false implication in prosecutor's closing argument); *United States v. Bivona*, 487 F.2d 443, 445-447 (2d. Cir. 1973) (prosecutor's remarks in summation severely criticized, but held harmless because proof of guilt was "overwhelming"). Indeed, apart from the dictates of due process, federal convictions obtained as a result of misstatements have been reversed in the exercise of supervisory powers. *E.g. United States v. Ott*, 489 F.2d 872, 875 (7th Cir. 1973) (Stevens, J.).

The principle is also settled that in a case of false or misleading prosecutorial statements it is irrelevant that the government attorney who spoke may have been unaware of the false or misleading character of his remarks, for the government is chargeable with awareness of material in its possession that contradicts versions of the facts represented to the court and jury. *Giglio v. United States*, 405 U.S. 150 (1972).

Accordingly, the proper inquiry in the case of a prosecutorial misstatement is whether any responsible officer of the prosecution "knew or should have known" of their false or misleading character. *United States v. Agurs, supra,* 44 U.S.L.W. at 5015; *Giglio v. United States, supra,* 405 U.S. at 154.

As has been shown above, the jury that found appellant guilty was misled as to the true circumstances surrounding the Eastern contract by the prosecutor's remarks at trial, and the misstatements almost certainly affected the verdict. On the present record it is not possible to ascertain to a certainty whether the government had within its possession at the time of appellant's trial facts sufficient to have indicated the inaccuracy of the statements the prosecutor made to appellant's jury, but there is ample ground for further inquiry. It is known that Randell, Kelly, Bushnell and Mullen—all of whom were familiar with the true circumstances concerning Eastern—appeared before a grand jury in the Southern District of New York, supervised by one or more of the government attorneys who supervised or participated in appellant's trial. Kelly, Bushnell and Randell had pleaded guilty prior to appellant's trial and it is a reasonable assumption that they were interviewed by the government outside the grand jury.

It is known that Randell, at least, was interviewed by the government prior to appellant's trial and that the circumstances surrounding the Eastern contract were discussed. In his deposition in the civil litigation involving National Student Marketing, Randell was asked whether he had discussed this background of the Eastern contract with the government attorney who prosecuted appellant:

> Q. "Did you discuss with Mr. Velie [then Assistant United States Attorney Franklin B. Velie] the matters which you have just testified to in response to my questions?

A. Yes.

Q. At what point in time was that?

A. The fall of 1974.

Q. Subsequent to Natelli's trial?

A. No. These matters were discussed prior to Natelli's trial.

Q. Did Mr. Velie take any notes at this time?

A. No, I do not believe he did, and I think he told us that he was not taking notes.

Q. Did he tell you why he was not taking notes?

A. I think he did.

Q. What did he say in that regard?

A. He said the reason he was telling me he wasn't taking notes was so that the notes would not have to be introduced into the trial."

(Deposition of Cortes W. Randell, reproduced in Appendix C, *infra*, p. App. 13).

The foregoing testimony is certainly strong evidence that the government—indeed the prosecutor at appellant's trial—had possession, prior to trial, of information that contradicted the statements made to appellant's jury. To the extent the government wishes to controvert this inference, further proceedings in the district court are warranted to determine what information was known to the government prior to appellant's trial. *See United States v. Hilton*, 521 F.2d 164 (2d Cir. 1975), *cert. denied*, 425 U.S. 939 (1976); *United States v. Morell*, 524 F.2d 550, 555 (2d Cir. 1975).[29]

[29] A post-conviction hearing may be held for the purpose of determining whether in fact a false or misleading statement was made to the jury, *Ring v. United States*, 419 U.S. 18, 19 (1974), but this determination is clear from the present record. What is in doubt here is whether any of the prosecutors knew, or had reason to know that the powerfully emotive version of the events being urged was false.

The district court dismissed appellant's §2255 motion on the pleadings alone, believing that no relief would be warranted because appellant might have called Randell as a witness and thereby developed the facts that ultimately emerged at Mullen's trial. This was the district court's most fundamental mistake, reflecting its apparent view that appellant was offering nothing more than a new trial motion based *merely* upon the existence of new evidence from a third party. Appellant's case is, of course, quite different. This is a case of prosecutorial misstatement—perhaps made entirely innocently by the government attorney who tried the case, but a misstatement nevertheless. The government is accountable for those misstatements, at least if facts sufficient to establish the errors were in its possession at the time of trial. It is the fact of prosecutorial misstatement that places this case "in a different category than if [new evidence] had simply been discovered from a neutral source after trial." *United States v. Agurs, supra*, 44 U.S.L.W. at 5017. Thus, in analyzing this case merely according to conventional standards regarding "newly discovered" evidence uncovered by the defense, Judge Owen overlooked this important extra dimension.

It is true that appellant's trial counsel made a tactical decision not to call Randell as a witness to try to elicit the corroboration the defense suspected Randell could provide if he had been willing to talk to defense counsel and to testify truthfully. The government may not have had an independent obligation to call Randell in order to make appellant's defense (althouth it did have an obligation to prove the falsity of the Eastern contract, for which, in retrospect, Randell may well have been an essential witness). Nevertheless, the government *did* have an obligation to refrain from arguing to the jury a version of the facts

which information within its possession established as untrue and which the government itself was shortly to use in prosecuting another defendant. That obligation reflects the principle that the government's only legitimate interest in any criminal prosecution is "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). It is that obligation which appellant seeks to have enforced here.

CONCLUSION

For the reasons stated in parts I and IIA, appellant's conviction should be set aside and a new trial granted as to the first specification of falsity. Alternatively, for the reasons stated in part IIB, the district court's denial of appellant's motion should be reversed and the case remanded with directions to hold an evidentiary hearing to determine what information was in the government's possession at the time of appellant's trial.

Respectfully submitted,

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Dated: January 10, 1977

APPENDIX A

1. Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78ff, provides in pertinent part:

> (a) Any person who . . . willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

2. Section 2255 of Title 28 of the United States Code provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and

conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * *

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * *

APPENDIX B

1. Program Commitment Letter

2. Eastern Airlines Commitment Letter (8/14/69)

3. Eastern Side Letter (8/14/69)

NATELLI'S EXHIBIT G

PROGRAM COMMITMENT LETTER

Date: _____

TO: National Student Marketing Corporation

This is to confirm our verbal commitment to Mr. _____ that sometime during _____ we will utilize National Student
Period: (Month, Season, etc.)
Marketing Corporation to undertake a marketing, promotional, and/or advertising program representing a gross billing to us of approximately $_____.

Sincerely,

_____
(Authorized Signature)

_____
(Name of Company)

_____
(Address)

GOVERNMENT'S EXHIBIT 18

EASTERN AIRLINES LETTER (8/14/69)

EASTERN AIR LINES INCORPORATED/10 ROCKEFELLER PLAZA/ NEW YORK, N.Y. 10020/212-956-4000

August 14, 1969

Mr. Robert C. Bushnell
National Student Marketing Corporation
345 Park Avenue
New York, New York

Dear Bob:

This is to confirm our verbal commitment given to you on May 14, 1969.

We will accept and utilize during the fiscal year, 1970, an amount of not less than $820,000 for National Student Marketing Corporation's services as offered to us in your proposal originally submitted on May 7, 1969.

We look forward to continued success in our youth marketing efforts and to our relationship with National Student Marketing Corporation.

Best regards,

/s/ Thomas E. Mullen
Thomas E. Mullen
Manager-Special Markets

TEM:jla

GOVERNMENT'S EXHIBIT 3
(United States v. Mullen, 74 Cr. 1172)

EASTERN SIDE LETTER

August 14, 1969

Mr. Thomas E. Mullen
Eastern Airlines
10 Rockefeller Plaza
New York, N Y. 10020

Dear Mr. Mullen:

This will confirm that as is usual with media contracts, your commitment to us dated August 14, 1969 would be cancellable upon delivery of thirty (30) days notice in writing not later than December 31, 1969.

Very truly yours,

NATIONAL STUDENT MARKETING

/s/ Cortes W. Randell
Cortes W. Randell
President

CWR:kmm

APPENDIX C

Excerpts from the Deposition of Cortes W. Randell, April 20-23, 1976, in *In re National Student Marketing Litigation* (D.D.C. Misc. 134-72) (M.D.L. Docket No. 105).

[325] BY MR. MONE:

Q Mr. Randell, my name is Matt Mone and, as I informed you earlier, I represent Peat, Marwick, Mitchell & Co. and Messrs. Natelli and Scansaroli. I have very few questions.

I believe in a portion of Mrs. Moore's examination, you detailed the circumstances under which you came to retain or NSM came to retain Peat, Marwick & Mitchell as its accountants in 1968 and you gave some testimony about conversations with Mr. Natelli. Was there any conversation with Mr. Natelli prior to Authur Andersen giving notice to NSM that it would not serve as its accountants for the next year?

A I don't believe there was, no.

Q Is it your best recollection that you initiated the contact with the Peat-Marwick partner after you learned from AA that they would not stand as auditors?

A Yes, that partner, of course, being the gentleman connected with the Shaffer Company first, as I recall, and I think he put me in contact with Natelli. That is correct.

Q This was all after your having received notice from Arthur Andersen?

A Yes, that's correct.

Q You made mention of a Peat-Marwick representative in [326] Chicago. Could that have been Kansas City? In connection there with, let me mention the name Larry Herner. Does that help?

A That is the gentleman. If he was in Kansas City, then I stand corrected.

Q There was a certain amount of testimony about events which took place at Pandick Press during mid-August 1969. I believe you told us that Mr. Natelli at Pandick Press expressed disagreement with including the Pontiac commitment in National Student Marketing's May 31, 1969 numbers; is that correct?

A That is correct.

Q When did you for the first time hear of Mr. Natelli's disagreement in that regard?

A I don't recall hearing that before the Pandick Press meeting, but I could be wrong on that.

Q Was it, to your knowledge, first brought up during the meeting or was it brought up on the airplane on the way up?

A It could have been discussed on the airplane. I don't recall.

Q Let me show you a document which was marked as Defendants' Exhibit 975, which purports to be a memorandum from Mr. Kurek to yourself dated August 7, 1969, "Re Pontiac," and ask you whether you recall seeing that document prior to [327] today.

A I don't recall specifically seeing it. I have no reason to believe I didn't.

Q Do you recall having any conversations with Kurek prior to the Pandick Press meeting about Natelli's reluctance to consent to the inclusion of Pontiac?

A Mr. Mone, I really don't recall any. I will just reiterate the fact that in my conversation with Mr. Natelli and on one occasion over the telephone with Jim Graham and, of course, my previous meeting in January, I believe it was, at Pontiac when the president of Pontiac turned to Jim and said, "I think it is a great program. Let's go ahead." All those contacts indicated to me that we still had a firm contract and that is why I offered to fly Tony out to speak to Jim to confirm that fact.

Q Was Mr. Natelli, nevertheless, clear throughout the evening that he would not consent to the inclusion of Pontiac?

A That is my recollection, yes.

Q In the course of your pleading to the indictment in the Southern District of New York, you acknowledged altering a letter from Pontiac, did you not?

A That's correct.

[328] Q What was the purpose for altering the letter?

A The reason was that when the letter came in, we felt that the statement "we are considering" rather than "we plan to" was not strong enough a statement, and I discussed it with Dennis and my understanding at the time was that he had gotten Jim Graham's permission to insert the words "we plan to" rather than "we are considering." This is the time that I participated in the Xeroxing of the change because Dennis said there was not enough time to get another letter from Jim and I thought we had Jim's permission to make that change.

Q What did you do with the letter after changing it? Let me rephrase the question. After altering the letter, did you show the altered letter to Natelli?

A I assume he subsequently got a copy of it. I did not give him a copy, no.

Q Do you know whether Natelli was ever shown the original letter from Graham?

A I don't know for certain whether he was or not. I would doubt it. I didn't keep the original letter.

Q Do you know what happened to it?

A I assume Dennis had it. At the time we changed it, I was told by Dennis that there was nothing illegal about changing [329] a letter if we had the permission of the writer to do so.

Q Did Kelly actually participate in the alteration of the letter? That is, the Xeroxing.

A The Xeroxing part, yes.

Q He did?

A Yes.

Q Mr. Randell, let me show you Plaintiffs' Exhibit 344, which is a letter on Eastern Airlines stationery dated August 14, 1969, from Mr. Mullen to Mr. Bushnell. Was this the letter that Mr. Kelly brought over to Pandick Press?

A Yes, I believe it was.

Q This is a copy of it. Were you aware in August 1969 that National Student Marketing was doing business with Eastern Airlines?

A Yes. Eastern Airlines was our biggest customer and I believe at that time they had bought and paid for a third of a million dollars worth of business. We had an excellent working relationship with them and I personally had no reason to believe that we would not get $800,000 of business over the entire period that this business would have been, which was the fall and the spring, the fall of 1969 as well as the spring of 1970.

Q Who was responsible at NSM for procuring that business? [330] Who was the account executive?

A I believe both Bob Bushnell and Dennis worked on it. I think Bob probably did the majority of the work on it.

Q The letter in the first paragraph refers to a verbal commitment given to Mr. Bushnell on May 14, 1969. Were you aware prior to the meeting at Pandick Press that Bushnell had earlier received a commitment from Eastern Airlines?

A Yes.

Q Was that general knowledge throughout the company?

MR. SEDKY: I object to the form belatedly.

BY MR. MONE:

Q Was the fact of the verbal commitment known, to your knowledge, throughout NSM when it was first received?

MR. SEDKY: I object to the form.

THE WITNESS: By "throughout NSM," I am talking about the people that would be involved that had responsibility. Being the chief executive officer, I had knowledge of it, yes. Those persons who were in involved in marketing I am sure had knowledge of it.

BY MR. MONE:

Q Did you have that knowledge in or around May of '69?

A Yes. That project, incidentally, had been going on [331] for a number of months. Bob Bushnell very often rode out on the train with Tom Mullen because they both lived together and they worked on the project riding out to their homes and riding back again. They spent many, many hours putting that program together. The previous work we had done for Eastern had been very successful and I felt the program they had put together, which I had reviewed briefly, was a very good one and I felt that both we and Eastern would benefit from it.

Q Did you have those feelings in August of 1969?

A Yes. My recollection was that we actually performed a portion of the contract that we were supposed to in the fall of '69, but you will note that the program was primarily for 1970. My understanding was the only reason that program was not performed is that Roger, with the approval of the executive committee, had depleted the campus rep force and altered the campus marketing program so it could not be performed.

Q Did you have any discussions with Tony Natelli in or arouud the time when this letter was presented to him as to your views on the Eastern contract and NSM's ability to perform it?

A I recollect that I was present when Dennis made the presentation and was in agreement with the fact that I wanted the company to perform it. At that time, with the big campus rep [332] system we had, we had the capability to perform it.

Q If I recall your testimony correctly, you stated in response to one of Mrs. Moore's questions that Dennis Kelly's presentation took place two hours before you left Pandick Press.

A That is my best recollection, yes.

Q That was during the daytime or into the next evening?

A Or afternoon, or something, yes. I think it was just before we came back.

Q Am I also correct that it was your testimony that Natelli responded that he would take the matter under advisement?

A That's right. I don't think he decided right then.

Q At Pandick Press?

A That's correct.

Q Did you discuss with Mr. Velie the matters which you have just testified to in response to my questions?

A Yes.

Q At what point in time was that?

A The fall of 1974.

Q Subsequent to Natelli's trial?

A No. These matters were discussed prior to Natelli's trial.

Q Did Mr. Velie take any notes at this time?

[333] A No, I do not believe he did, and I think he told us that he was not taking notes.

Q Did he tell you why he was not taking notes?

A I think he did.

Q What did he say in that regard?

A He said the reason he was telling me he wasn't taking notes was so that the notes would not have to be introduced into the trial.

Q Did Mr. Natelli or Mr. Scansaroli ever propose to you or, to your knowledge, any other person connected with NSM any actions which you considered to be wrong?

MR. SEDKY: That who considered to be wrong, Mr. Mone?

MR. MONE: That Mr. Randell considered to be wrong.

THE WITNESS: By "wrong," you mean what?

BY MR. MONE:

Q Unlawful or fraudulent.

A No.

Q Have you finished?

A I was just going to say, as I discussed earlier, there were times -- for instance, in the case of the travel company when I thought, that is, myself and other members of the firm, that the earnings ought to be allowed before the students landed [334]

again, but that was a question of accounting judgment, not a question of fraud or illegal activity.

MR. McMENAMIN: Off the record.

(Discussion off the record.)

MR. MOONE: I have no further questions.

EXAMINATION BY COUNSEL FOR DEFENDANTS WHITE & CASE AND MARION JAY EPLEY, III

BY MR. WINTER:

Q Mr. Randell, my name is Robert Winter and I represent White & Case and Mr. Epley in these actions. I believe during the course of Mrs. Moore's examination, you indicated that at times material was distributed to NSMC employees advising them of such matters as a requirement not to trade on inside information; is that correct?

A Yes.

Q I would like to show you several documents now pertaining thereto, and I generally will be asking you to identify those documents.

MR. WINTER: I would like to ask the reporter to mark as Defendants' Exhibit 1733-R a one-page memorandum dated September 3, 1968, from Mr. Cortes G. Randell to "All Staff."

(The document referred to was marked Defendants' Exhibit No. 1733-R for identification.)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee v. ANTHONY M. NATELLI, Defendant-Appellant.	No. 76-1494

CERTIFICATE OF SERVICE

I hereby certify that I have caused two copies of the printed Brief of Defendant-Appellant, Anthony M. Natelli and 2 copies of the Joint Appendix to be hand-delivered this 9th day of February, 1977 to Jed S. Rakoff, Assistant United States Attorney, 1 St. Andrews Plaza, New York, New York 10007, attorney for appellee United States of America.

Philip A. Lacovara

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